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No. 86-482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PATCHOGUE NURSING CENTER,

Petitioner,

vs.

OTIS R. BOWEN, M.D., as Secretary of the United States Department of Health and Human Services, and DAVID AXELROD, as Commissioner of the New York State Department of Health,

Respondents.

MEMORANDUM IN OPPOSITION FOR RESPONDENT AXELROD

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INTRODUCTION

Petitioner Patchogue Nursing Center ("Patchogue") seeks review of an Order of the United States Court of Appeals for the Second Circuit entered July 22, 1986, which affirmed an order of the United States District Court for the Eastern District of New York, denying Patchogue's motion for a preliminary injunction. Patchogue, a skilled nursing facility, sought to bar respondent Secretary of the United States Department of Health and Human Services ("HHS") from imposing the intermediate sanction of a ban of limited duration on Medicaid and Medicare reimbursement for new admissions pursuant to section 916 of the Omnibus Reconciliation Act of 1980, 42 U.S.C. § 1395cc(f) ("ban" or "intermediate sanction"). This request should be denied because it does not present a special or important reason within Supreme Court Rule 17(1)

for granting a writ of certiorari, and there is no conflict among the United States Circuit Courts of Appeal regarding this issue.

The Process for Imposition of the Intermediate Sanction

The federal statutory and regulatory scheme mandates that a skilled nursing facility be evaluated periodically to ensure that it complies with the eighteen Medicare conditions of participation. 42 U.S.C. § 1395x(j) and 42 C.F.R. Part 405, subpart K.[1] The New York State Department of Health ("DOH") surveys skilled nursing facilities for compliance with the conditions of participation of the Medicare program pursuant to an agreement with HHS. 42 U.S.C. § 1395aa.[2]

The intermediate sanction of a ban on Medicare and Medicaid admissions is imposed by HHS pursuant to 42 U.S.C. § 1395cc(f), "where the [survey reveals] deficiencies [which] are of such character as to substantially limit the provider's or supplier's capacity to render adequate care or which adversely affect the health and safety of residents." 42 C.F.R. § 405.1905. The ban is limited to a period not to exceed eleven months. 42 U.S.C. § 1395cc(f)(3). If the deficiencies are not corrected at the end of the eleven months, the provider agreement is terminated and the facility closed, 42 U.S.C. § 1395cc(f)(3), subject to the facility's right to a full post-termination administrative hearing and to judicial review. 42 U.S.C. § 1395ff(c).

HHS provides the nursing home with a reasonable opportunity to correct its deficiencies and reasonable notice and an opportunity to present its case at an informal hearing before any adverse

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[1] Each of the eighteen Medicare conditions of participation consists of numerous standards which are subdivided into various elements. 42 C.F.R. §§ 405.1101-405.1137.

[2] DOH is also the state survey agency for institutions in which Medicaid recipients received services 42 C.F.R. § 431.115(b) and may certify that facilities meet standards for participation in the Medicaid program. 42 C.F.R. § 442.10.

action is taken against a facility, including the intermediate sanction. 42 U.S.C. § 1395cc(f). The sanction will be lifted when the deficiencies are corrected, or it is determined that the facility is making a good faith effort to achieve substantial compliance with the conditions of Medicare participation. 42 U.S.C. § 1395cc(f)(3).

Statement of the Case

Petitioner is authorized to provide skilled nursing services for up to a total of 120 Medicare (42 U.S.C. § 1395 *et seq.*) and Medicaid (42 U.S.C. § 1396) recipients pursuant to a Medicare provider agreement with HHS.[3]

DOH conducted an annual on-site survey of Patchogue on January 22, 1985 in accordance with 42 U.S.C. § 1395aa to determine whether Patchogue was in compliance with the conditions of participation. The DOH surveyors found Patchogue out of compliance with two Medicare conditions of participation, Governing Body and Management, *see* 42 C.F.R. § 405.1121 and Dietetic Services *see* 42 C.F.R. § 405.1125 (App. 32).[4]

After the survey, DOH held an exit conference to advise Patchogue of the survey findings (App. 32). Thereafter, DOH sent Patchogue a Statement of Deficiencies detailing the areas of non-compliance and the applicable regulatory authority. DOH requested a Plan of Correction from Patchogue, informing Patchogue of the possible sanctions for continued non-compliance. (App. 32).

DOH conducted another survey of Patchogue on March 8, 1985. Thereafter, at the exit conference, the surveyors apprised the operator of their findings of continued non-compliance with the Medicare conditions of participation as well as eleven additional deficiencies relating to the condition of Dietetic Services, *see* 42 C.F.R. § 405.1125(g) (Sanitary Conditions) (App. 33).

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[3] Patchogue was issued its most recent Medicare provider agreement effective December 11, 1984, but has entered into prior agreements since 1977.

[4] References preceded by "App." are to pages of the appendices annexed to the petition.

Patchogue submitted a Plan of Correction on March 18, 1985. DOH formally responded and rejected the plan as unacceptable on May 13, 1985. DOH included a detailed statement explaining why the plan was inadequate and also requested a revised Plan of Correction. (App. 33). DOH representatives contacted the nursing home operator numerous times by phone and by mail to discuss the cited deficiencies and the Plan of Correction and to inform him of his rights and the possible penalties for non-compliance. (App. 43).

DOH advised HHS by letter dated June 6, 1985 that Patchogue was not in compliance with two Medicare conditions of participation and recommended the imposition of the intermediate sanction of a ban on admissions. 42 U.S.C. § 1395cc(f) (App. 33). HHS subsequently notified Patchogue of the possible ban and advised Patchogue that it could request an informal hearing to present evidence contradicting the finding of non-compliance. (App. 33).

An informal hearing was held by HHS on July 22, 1985. Representatives from Patchogue and DOH were present. (App. 33). Patchogue did not present any factual evidence to dispute the accuracy of the survey. Patchogue simply denied it was ever out of compliance and accused DOH of incompetence and prejudice. (App. 33).

Pursuant to Patchogue's request at the hearing, another survey was conducted on July 31 and August 1 by DOH surveyors, DOH officials from Albany and a federal nutrition consultant. (App. 33-34). This survey revealed continued non-compliance with the two conditions of participation. An exit conference was held after the survey and Patchogue was advised of the findings. (App. 34). The federal nutrition consultant concurred with DOH's findings and sent a written report of the results to Patchogue. DOH sent a copy of the survey report and a Statement of Deficiencies to Patchogue. (App. 34).

HHS renewed its notice of intent to impose a ban in September 1985 and offered Patchogue an informal hearing to address the results of the July/August survey. (App. 34). This second hearing

was held on October 11, 1985. (App. 34). Again, Patchogue did not present any factual evidence to dispute the accuracy of the survey. HHS issued its notice to impose a ban on January 2, 1986.[5] (App. 34).

The District Court Decision

Patchogue sought preliminary injunctive relief from the District Court (Weinstein, Ch. J.) on the ground that Patchogue did not receive adequate due process prior to the imposition of the ban. The District Court denied the motion and held that there was no substantial likelihood of success on the merits of petitioner's due process claim. The court found that, considering all of the evidence produced regarding the conferences and negotiations between Patchogue, DOH and HHS, "the plaintiff was fully advised of the complaints of the government". The court also held that the "series of detriments to the quality of life of the residents" were "sufficient to warrant a ban." (App. 27-28).

The Circuit Court Decision

The Circuit Court affirmed the order of the District Court and held that the process accorded petitioner was "fully adequate and sufficiently protects the private interest -- the financial and reputational well-being of the appellant." (App. 45). "Patchogue was fully capable of communicating its views to the decision makers and was accorded numerous opportunities over a period of months to demonstrate either orally or in writing that the ban should not be imposed. [It] was supplied with detailed statements and was encouraged to contact agency administrators for assistance if necessary." *Id.* The court also found that "the procedures at issue safeguard against mistaken decisions and the concomitant harm they would cause."[6] (App. 46).

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[5] Patchogue submitted an acceptable Plan of Correction after the ban was imposed.

[6] The U.S. Circuit Court of Appeals stayed the imposition of the intermediate sanction pending application for certiorari on condition that petitioner post a bond.

ARGUMENT

As will be shown, the petition in this case should be denied because there are no "special" or "important" issues warranting review by this Court and the petitioner has not demonstrated any conflict between the Circuits. Sup. Ct. R. 17.[7] Petitioner argues that the informal hearings provided by HHS prior to imposing a ban on admissions were insufficient to satisfy due process. An examination of the facts leading to the imposition of the ban, however, illustrates the consistent failure of the nursing home to comply with public health standards meant to protect the residents of the nursing home. Petitioners were accorded ample procedural safeguards prior to the imposition of the ban and these safeguards, combined with the informal hearing held by HHS, more than meet minimum due process standards.

This Court has repeatedly held that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).[8] The factors to be considered in determining the adequacy of administrative procedures are set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> [F]irst, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

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[7] Moreover, a petition for certiorari will not ordinarily be granted until a final judgment has been rendered. *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J. dissenting), *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967). The policy against review of interlocutory orders is important where, as here, a complete development of the facts regarding the procedures afforded would be helpful in assessing the merits of the arguments presented.

[8] Petitioner now claims that it was entitled to a full evidentiary hearing after imposition of the ban. It did not make this argument below, but contended only that it was entitled to such a hearing before imposition of the ban.

> procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying these factors, it is apparent that the private interest of the home in avoiding the imposition of a ban, is of limited weight. The Medicaid and Medicare statutes and regulations were not intended "to provide financial assistance to providers of care for their own benefit." *Green v. Cashman*, 605 F.2d 945, 946 (6th Cir. 1979). Rather, the Medicaid and Medicare acts are designed to aid eligible patients. *Id.* at 946. As the Second Circuit wrote in *Case v. Weinberger:*

> A nursing facility's 'need' for patients has nothing to do with the statutory benefits structure...[T]hat a particular nursing facility cannot survive without Medicaid participation was certainly not Congress' foremost consideration in its creation of the Medicaid program.

523 F.2d 602, 607 (2d Cir. 1975).

Moreover, Patchogue can, itself, limit the duration of the ban or avoid it entirely by taking prompt corrective action. The Second Circuit emphasized that Patchogue was given repeated notice of its deficiencies and ample opportunity to correct them. The court wrote:

> The record is replete with evidence refuting appellant's contentions that it was without notice of its deficiencies and was denied an opportunity to implement an adequate plan of correction.

(App.43).

Furthermore, this case does not involve the permanent closure of a nursing home, but only a ban of limited duration which will be rescinded as soon as the nursing home corrects (or even makes a good faith effort to correct) its deficiencies pursuant to the Plan of Correction which has already been proposed by the home and approved by DOH.

Applying the second factor, the procedures followed prior to imposing a ban make it extremely unlikely that a ban will be erroneously imposed. Both HHS and DOH surveyors conducted inspections of the nursing home. Their findings showed that Patchogue failed to meet minimum standards regarding two conditions of participation in the Medicaid and Medicare programs: "Governing Body and Management," 42 C.F.R. § 405.1121 and "Dietetic Services," 42 C.F.R. § 405.1125. These deficiencies were documented in three separate surveys over a six month period and consistently demonstrated that Patchogue lacked the capacity to render adequate care to the patients residing there

DOH fully delineated each of the home's deficiencies at exit conferences and in detailed correspondence. The nursing home responded only by making unsubstantiated allegations regarding the surveyors' judgments. Not once during its exit conferences, its correspondence with DOH or at the informal hearings held by HHS, did Patchogue provide any factual basis or any documentary evidence to refute the surveyors' findings.[9]

In *Town Court Nursing Center, Inc. v. Beal*, 586 F.2d 266, 277 (3d Cir. 1978), the Third Circuit described the survey process and its accuracy in evaluating the care at nursing facilities.[10] The Court wrote:

> It is based in most cases upon routine, standard, unbiased reports by health care professionals. Those professionals evaluated the provider in light of well-defined criteria that were developed in the administrative rule making process. Written submissions are adequate to allow the provider to present his case. Given the

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[9] Because petitioner failed to make any factual assertions disputing the substantial accuracy of the surveys, it did not demonstrate the need for the full evidentiary hearing it claims is envisioned by *Cleveland Board of Education v. Loudermill*, __ U.S. __ 105 S. Ct. 1985; see *Codd v. Velger*, 429 U.S. 624, 628 (1977).

[10] *Town Court Nursing Center* is a case involving the termination of a provider agreement. However, the same process is accorded to a nursing home by DOH prior to any recommendation to impose the intermediate sanction of a ban.

> extensive documentation that the provider is able to submit in response to the findings of the survey teams, the provider is unlikely to need an evidentiary hearing to present his position more effectively.

Thus, given the effectiveness of the survey process in general and considering the facts in this case, it is extremely unlikely that the ban was erroneously imposed.

Applying the third factor, the Government has an obvious and substantial interest in protecting the residents at Patchogue. A full evidentiary hearing, where DOH surveyors could be extensively cross-examined regarding their judgments and the factual basis for each of their determinations, would be extremely time consuming and burdensome. As the Second Circuit wrote:

> Most importantly, it should be recognized that the interest of the government in protecting the health, safety, and welfare of the residents at Patchogue far outweighs any financial harm which appellant might suffer. While the residents may not be harmed *immediately*, they will be placed in *jeopardy* by extant conditions at Patchogue. At some point, the rights of the caretaker must end and the rights of the cared-for begin.

(App. 46-47).

Considering all the factors set forth in *Mathews v. Eldridge*, it is apparent that the Government's interests far outweigh those of the nursing home, that the procedural safeguards gave the home adequate protection and that the ban was properly imposed. Under these circumstances, there is no "special" or "important" reason for this Court to grant the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 28, 1986

Respectfully submitted,

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